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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF SAN DIEGO  
14 CENTRAL DIVISION

15 THE PEOPLE OF THE STATE OF  
16 CALIFORNIA and THE CITY OF SAN  
DIEGO, a municipal corporation,

17 Plaintiffs,

18 v.

19 SUNROAD CENTRUM, L.P., a California  
20 Limited Partnership, SUNROAD ASSET  
MANAGEMENT, INC., a California  
21 corporation, SUNROAD ENTERPRISES,  
CALIFORNIA DEPARTMENT OF  
22 TRANSPORTATION, AERONAUTICS  
DIVISION, and DOES 1 through 50,  
23 inclusive,

24 Defendants.

CASE NO. GIC 877054

CROSS-DEFENDANT AND RESPONDENT  
CITY OF SAN DIEGO'S AMENDED  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS  
DEMURRER TO CROSS-COMPLAINT OF  
SUNROAD CENTRUM, L.P., SUNROAD  
ASSET MANAGEMENT, INC., AND  
SUNROAD ENTERPRISES

Date: May 11, 2007

Time: 2:30 p.m.

Dept.: 64

Judge: William R. Nevitt, Jr.

Trial Date: Not Yet Set

Complaint Filed: 12/15/2006

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SUNROAD CENTRUM, L.P., a California  
Limited Partnership, SUNROAD ASSET  
MANAGEMENT, INC., a California  
corporation, SUNROAD ENTERPRISES,

Cross-Complainants  
and Petitioners,

v.

THE CITY OF SAN DIEGO, municipal  
corporation, and DOES 1 through 10,  
inclusive,

Cross-Defendants  
and Respondents.

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1 **I. INTRODUCTION**

2 In response to the City of San Diego's ("City") effort to ensure the continuing safety of  
3 air travel in the region, cross-complainants Sunroad Centrum, L.P., Sunroad Asset Management,  
4 Inc., and Sunroad Enterprises (collectively "Sunroad") now seek \$40 million in damages and an  
5 order prohibiting the City from acting on behalf of the public welfare. Sunroad alleges that the  
6 City has improperly stopped construction on a twelve-story office complex in Kearny Mesa,  
7 which is only 0.7 miles from Montgomery Air Field ("MAF"). The City required Sunroad to  
8 limit the height of its project by twenty feet to avoid the creation of an air hazard, as identified by  
9 the Federal Aviation Administration ("FAA"). The City initiated this lawsuit on  
10 December 15, 2006, seeking a judicial determination that Sunroad's continuing construction  
11 constitutes a public nuisance. In response, Sunroad filed a Cross-Complaint, asserting the  
12 following causes of action: (1) equitable estoppel; (2) inverse condemnation; and (3) writ of  
13 mandate. Sunroad has failed to alleged facts sufficient to support a legal basis for its claims.

14 **II. FACTUAL BACKGROUND**

15 Taking the allegations of the Cross-Complaint as true, as is required at this stage,  
16 Sunroad alleges as follows. Sunroad and the City entered into a Development Agreement in  
17 1997 for a series of office and residential buildings called the Centrum Project. *See* Cross-  
18 Complaint and Petition for Writ of Mandate ("CC") ¶ 1. The project's first building, the subject  
19 of this dispute, is a 12-story office building ("Sunroad Building" or "Building") located within  
20 one mile of Montgomery Air Field. CC ¶ 1, 4. The City issued the framing and foundation  
21 permit for the Building on March 27, 2006. CC ¶ 3. As designed and permitted, the Building  
22 would rise to 180 feet above ground level ("AGL"). CC ¶ 2, 3.

23 On April 5, eight days *after* receiving the permit from the City, Sunroad filed a Notice of  
24 Proposed Construction with the Federal Aviation Administration ("FAA") even though the  
25 agency mandates it be completed at least 30 days *before* the application for a construction  
26 permit. CC ¶ 5.<sup>1</sup>

27 \_\_\_\_\_  
28 <sup>1</sup> The FAA requires advance notice for any proposed construction which may pose a hazard to  
air travel. 14 C.F.R. § 77.13 (a). The person responsible for such construction must give

1 In response, the FAA warned that if the Building rose above 160 feet AGL, it would be a  
2 hazard to air navigation. CC ¶ 7; Godfrey Decl., Exh. A. Sunroad was given 60 days from April  
3 24 to fix the hazard. *Id.* Three days before the time elapsed, Sunroad notified the FAA in a  
4 letter dated June 20, 2006, that it would halt construction at the non-hazardous level of 160 feet  
5 AGL. CC ¶ 9. Two days later, Sunroad submitted a FAA form 7460-1 indicating that the  
6 building height would be only 160 feet AGL. CC ¶ 9. On July 7, 2007, the City issued Sunroad  
7 another permit for the Building under the originally designed height of 180 feet. CC ¶ 3.

8 Supplanting the FAA's expert judgment of air safety with its own, Sunroad concluded  
9 that the Building, in fact, did not pose a hazard at 180 feet AGL. CC ¶ 10. Sunroad informed  
10 the FAA of its intent to disregard the FAA's assessment and to build to the originally planned  
11 height 180 feet AGL. *Id.* On the very same day, July 26, 2006, Sunroad also let the FAA know  
12 that it had installed steel frames and was already at 180 feet AGL. *Id.* One month later on  
13 August 11, the FAA disagreed with Sunroad's determination and issued a Determination of  
14 Hazard to Air Navigation, concluding that "the structure has a substantial adverse effect on the  
15 safe and efficient utilization of navigable airspace by aircraft and is a hazard to air navigation."  
16 CC ¶ 11, Godfrey Decl., Exh. B.<sup>2</sup>

17 On October 17, 2006, the City issued a Stop Work Order ("SWO") for the Building,  
18 requiring that construction stop on the top seventeen feet of the Building. CC ¶ 13. The SWO  
19 was later revised to cover the top 20 feet. *Id.* Sunroad appealed the SWO on November 28,  
20 2006, and the City responded in a letter dated December 21, 2007, by allowing limited  
21 construction on the top 20 feet of the Building. CC ¶ 14.

22 On December 15, 2006, the City filed this lawsuit against Sunroad to enforce the FAA's  
23 hazard determination and to prohibit Sunroad from building above 160 feet AGL given the  
24 continuing threat to the safety of air travel. CC ¶ 15. Based on these claims, Sunroad filed this  
25

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26 notice before the date the construction is planned to begin or the construction permit is to be  
27 filed, whichever is earlier. *Id.* § 77.17(b).

28 <sup>2</sup> Defendant's Cross-Complaint states that the Determination of Hazard to Air Navigation was  
issued on August 26, 2006. The document itself, however, is dated August 11, 2006. *See*  
Godfrey Decl., Exh. B.

1 Cross-Complaint to enjoin the City from further interference with the construction of the  
2 Building and to recover alleged damages attributable to the City's actions.

3 **III. LEGAL STANDARD**

4 "A demurrer properly is granted when the pleadings fail to state facts sufficient to  
5 constitute a cause of action." *Washington v. County of Contra Costa*, 38 Cal. App. 4th 890, 895  
6 (1995); *see also* Cal. Civ. Proc. Code § 430.10(e). A demurrer "admit[s] all material facts  
7 properly pleaded, but not contentions, deductions or conclusions of fact or law." *Serrano v.*  
8 *Priest*, 5 Cal. 3d 584, 591 (1971). *See also Freeman v. San Diego Ass'n of Realtors*, 77 Cal.  
9 App. 4th 171, 185 (1999) ("Although a court must on demurrer accept as true properly pleaded  
10 facts, a demurrer does not admit contentions or conclusions of law or fact."). The Court may  
11 consider, as grounds for a demurrer, any matter which the court must or may judicially notice  
12 under Evidence Code §§ 451 or 452. *See* Cal. Civ. Proc. Code § 430.30(a). The allegations of  
13 the complaint are not accepted as true if they contradict or are inconsistent with facts judicially  
14 noticed by the court. *Del. E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604  
15 (1981) ("Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters  
16 judicially noticed by the court render the complaint meritless.").

17 **IV. SUNROAD FAILS TO STATE CLAIMS FOR EQUITABLE ESTOPPEL AND**  
18 **INVERSE CONDEMNATION BECAUSE SUNROAD DOES NOT ALLEGE**  
19 **FACTS ESTABLISHING VESTED RIGHTS IN A 180-FOOT STRUCTURE**

20 In its First Cause of Action, Sunroad alleges that it framed the Building to its full 180-  
21 foot height in good faith reliance on the City's permit, and as a result, its rights in the Sunroad  
22 Building have vested as a matter of law and the City is estopped from "taking any action to limit  
23 Sunroad from performing work consistent with or in accordance with the building permit."  
24 CC ¶¶ 20-24. Likewise, in its Second Cause of Action, Sunroad asserts a claim for inverse  
25 condemnation, alleging that its "property interest in the Building was vested, at the latest, upon  
26 the City's issuance of the Building permit." CC ¶ 26. The only portion of the Building which  
27  
28

1 Sunroad alleges was “taken” is the “top 26 feet of the Building,”<sup>3</sup> and the only basis for a  
2 property right that was asserted was the existence of the building permit. CC ¶ 28.

3 Sunroad’s equitable estoppel and inverse condemnation claims both are based on the  
4 identical theory --- “vested” rights under the building permit --- and Sunroad alleges no legally  
5 sufficient facts to state either cause of action. To state a claim for equitable estoppel, a plaintiff  
6 must allege: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that  
7 his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to  
8 believe it was so intended; (3) the other party must be ignorant of the true state of facts; and  
9 (4) he must rely upon the conduct to his injury.” *City of Goleta v. Superior Court*, 40 Cal. 4th  
10 270, 279 (2006). This doctrine is designed to give a vested right to a property owner if it has  
11 incurred substantial liabilities *in good faith reliance* upon a permit issued by the government.  
12 *Avco Community Developers, Inc. v. South Coast Regional Comm’n*, 17 Cal. 3d 785, 791 (1976).

13 An inverse condemnation claim also requires the establishment of a property right as a  
14 threshold matter to asserting a claim. *See Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th  
15 1060, 1075 (1995) (“To state a cause of action for inverse condemnation, a landowner must  
16 allege not only *ownership of the property*, but also the governmental entity’s taking or damaging  
17 of property, and substantial *damage to property rights* that was substantially caused by the  
18 entity’s conduct”) (emphasis added). Accordingly, Sunroad must “alleg[e] and prov[e]  
19 [Sunroad’s] property right” in the top 26 feet of the Building and the “infringement” of that right  
20 by the City. *Buckley v. Cal. Coastal Com.*, 68 Cal. App. 4th 178, 192 (1998).

21 Sunroad’s allegations establish that it does *not* have a vested right to construct its  
22 building in violation of local, state, and federal law. Sunroad’s allegations do not support a  
23 legitimate expectation of present *or* continued rights in the top 26 feet of the Building.  
24 Sunroad’s legal conclusion that its rights in the Building framed to its full 180-foot height are  
25 “fully vested” due to the City’s issuance of the permit is belied by the allegations in the Cross-

26 \_\_\_\_\_  
27 <sup>3</sup> The source of this number is unclear, given Sunroad’s claims that (1) the City’s permit  
28 allowed them to build up 180 feet, (2) Sunroad told the FAA the building would rise to 180  
feet, and (3) the City’s amended SWO limits construction to the top 20 feet of the Building.  
CC ¶¶ 3, 10, 13, 17. For the purpose of the Demurrer, Sunroad’s figure is accepted as true.

1 Complaint. See CC ¶ 21. The issuance of a City permit does not, on its own, grant a party  
2 unlimited “vested rights.” Rather, vested rights gained in reliance of a government permit are  
3 “no greater than those specifically granted by the permit itself.” *Santa Monica Pines, Ltd. v.*  
4 *Rent Control Board of the City of Santa Monica*, 35 Cal. 3d 858, 866 (1984). Furthermore, a  
5 property owner does not gain vested rights in reliance on approval by a local public entity where  
6 the rules and practices adopted by the county did not conform with the requirements of state law.  
7 See *People v. County of Kern*, 39 Cal. App. 3d 830, 842-43 (1974).

8 Municipal Code § 111.0102 grants the City authority to issue building permits. However,  
9 any such permit was necessarily conditioned on compliance with Municipal Code § 121.0308,  
10 which provides that the issuance of a permit “does not prevent the City Manager from  
11 subsequently requiring the correction of errors in the plans, specifications, and other data or the  
12 Building Official from stopping building operations that are in violation of the Land  
13 Development Code or *any other applicable law.*” *Id.* (emphasis added). Thus, based on the  
14 Municipal Code provisions, as a matter of law, any building permit issued by the City does not  
15 provide the applicant with a vested right to build a structure which is “in violation of the Land  
16 Development Code” or “any other applicable law,” which would include the requirements of the  
17 FAA or the California Department of Transportation (“CalTrans”). These provisions establish  
18 that the building permit issued to Sunroad does not create a free pass to build a 180-foot structure  
19 as Sunroad wishes, but rather it may do so only if such a structure complies with *every* relevant  
20 law applying to the construction of the Building, *including* federal and state regulations.<sup>4</sup>

21 Based on Sunroad’s own allegations, the Building currently violates federal and state law.  
22 Sunroad alleges that it failed to notify the FAA of the project until *after* receiving the permit  
23 from the City, and after construction had begun, in violation of 14 C.F.R. § 77.14. CC ¶ 6.  
24 Sunroad alleges that on April 24, 2006, the FAA issued a “Notice of Presumed Hazard”  
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26 <sup>4</sup> Moreover, Sunroad’s permit was subject to Municipal Code § 121.0302(i), which provides  
27 that “[t]he City may take any appropriate enforcement action to abate a public nuisance,  
28 *despite the issuance of any permits* to maintain, later, expand, or reconstruct a structure.”  
Thus, the permit was conditioned by the City’s ability to issue the stop work permit to abate  
any public nuisance.

1 informing Sunroad that the Building would intrude into the navigable airspace of the  
2 Montgomery Air Field by 20 feet. CC ¶ 7. Despite receiving the FAA’s notice that the Building  
3 should not exceed 160 feet AGL, Sunroad alleges that it constructed the Building to 180 feet  
4 AGL. CC ¶ 10. Sunroad further admits that the FAA issued a “Determination of Hazard to Air  
5 Navigation” on August 26 [really August 11], pursuant to 14 C.F.R. § 77.35(c). CC ¶ 11.  
6 Because Sunroad did not receive a “No Hazard” Determination, Sunroad is required obtain a  
7 permit from CalTrans pursuant to the Public Utilities Code § 21659. Sunroad does not allege its  
8 compliance.

9         Based on its allegations, any “vested rights” Sunroad might have obtained through the  
10 permit issued by the City under the Municipal Code cannot as a matter of law include the right to  
11 construct the Building to 180 feet AGL, as such height violates state and federal law. *See*  
12 Municipal Code § 121.0308.<sup>5</sup> As Sunroad has not alleged adequate facts to establish a “vested  
13 right” that has been violated by the City’s actions, Sunroad cannot maintain an equitable estoppel  
14 or an inverse condemnation claim against the City.

15 **V. SUNROAD FAILS TO STATE A CLAIM FOR INVERSE CONDEMNATION OR**  
16 **EQUITABLE ESTOPPEL BECAUSE THE ALLEGATIONS ESTABLISH THAT**  
17 **IT HAD NOTICE THAT THE BUILDING VIOLATED STATE AND FEDERAL**  
18 **LAW, THUS IT FRAMED THE BUILDING TO 180 FEET AT ITS OWN PERIL**

19         As a second separate and independent ground, the demurrer should be sustained based on  
20 Sunroad’s failure to allege facts constituting good faith reliance on the City’s permit. To state a  
21 claim for equitable estoppel or a vested property right for inverse condemnation, a party must  
22 allege that they relied on the permit in good faith. *See Avco*, 17 Cal. 3d at 791 (holding that to  
23 complete a planned construction, a landowner must act in “good faith reliance upon a permit  
24 issued by the government”); *Autopsy/Post Services, Inc. v. City of Los Angeles*, 129 Cal. App.  
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26 <sup>5</sup> Even accepting Sunroad’s allegations, the City was thus permitted under the Municipal Code  
27 to issue the SWO due to Sunroad’s failure to comply with the applicable state and federal  
28 laws. *See* Municipal Code § 121.0309(a). This is particularly the case because Sunroad  
alleges that the Sunroad Building has been identified by the FAA to constitute a danger to  
public safety.

1 4th 521, 529 (2005) (holding that landowner lacked vested rights when it acted in bad faith by  
2 misleading the government agency as to the nature of its business when applying for the permit);  
3 *Stokes v. Bd. of Permit Appeals*, 52 Cal. App. 4th 1348, 1357 (1997) (“[The permit holder] did  
4 not act in good faith reliance on the building permits and has not vested right to complete  
5 construction.”).

6 Similarly, where a developer knows the permit upon which it relies is or might be  
7 defective, no vested property right will arise. *See Strong v. County of Santa Cruz*, 126 Cal. 3d  
8 610, 617 (1975) (a developer cannot claim a vested right in reliance on a permit that he had  
9 reason to know might be defective); *Pettit v. City of Fresno*, 34 Cal. App. 3d 813, 823 (1973)  
10 (property owner can be required to remove structure built under invalid building permit, even  
11 though permit was regular on its face and property owner acted without actual knowledge of any  
12 defect in it). Moreover, estoppel cannot be invoked against a public agency “where it would  
13 defeat the effective operation of a policy adopted to protect the public.” *Id.* at 822.

14 Here, Sunroad has not alleged facts establishing good faith reliance on the City’s permit.  
15 Rather, based on the following, Sunroad had ample knowledge that the Building would violate  
16 state and federal law *before* Sunroad framed the Building to 180 feet AGL, but nonetheless  
17 continued construction at its own peril:

- 18 • **March 27, 2006:** Sunroad sought and obtained permits for the Building to a height of  
19 180 feet, without first giving the requisite 30-day notice to the FAA. *See* CC ¶¶ 3, 6.
- 20 • **April 5, 2006:** *After* receiving the framing and foundation permit, Sunroad tardily filed  
21 its Notice of Proposed Construction with the FAA. CC ¶ 6.
- 22 • **April 24, 2006:** Less than 30 days later, the FAA issued a “Notice of Presumed Hazard.”
- 23 • **April 24, 2006 – June 20, 2006:** Sunroad disregarded the FAA’s notice, and continued  
24 construction on the Sunroad Building, despite the FAA’s warning. *See* CC ¶¶ 7, 9.
- 25 • **June 20, 2006:** Sunroad finally responded to the FAA, asserting that it would “halt  
26 construction of the Building at 160 feet[.]” CC ¶ 9.
- 27 • **June 22, 2006:** Sunroad submitted a FAA Form 7460-1 Form to the FAA indicating that  
28 the Building’s maximum height would be only 160 feet. CC ¶ 9.

- 1       • **July 26, 2006:** Despite its assurances to the FAA, Sunroad announced that it intended to  
2       build the Building to 180 feet, and without FAA approval, framed the Building to 180  
3       feet AGL. *See* CC ¶ 10.
- 4       • **August 26, 2006:** The FAA issued to Sunroad a Determination of Hazard to Air  
5       Navigation. Nonetheless, Sunroad continued to build to 180 feet, ceasing only when the  
6       City issued a stop work order nearly two months later. CC ¶¶ 11, 13.

7       Thus, Sunroad alleges that it continued to construct the Building to 180 feet AGL, despite  
8       multiple warnings from the FAA that such a height was unacceptable under federal law. Even  
9       more striking, Sunroad alleges that it assured the FAA that it would stop construction at 160 feet,  
10      but only one month later, resumed construction on the building to 180 feet without notice to or  
11      approval of the FAA, relying on its “own study” that allegedly confirmed that the Building posed  
12      no threat to safety. CC ¶ 10. Because Sunroad alleges that it “chose to ignore [the FAA’s]  
13      warning, it did so . . . at [its] peril,” and thus cannot state a claim for equitable estoppel or  
14      inverse condemnation. Sunroad has not alleged facts supporting the required good faith reliance  
15      on the City’s permit to construct the Building to 180 feet AGL; rather, it alleges that it had ample  
16      notice that such height violated state and federal law, and that it proceeded ahead nonetheless  
17      “solely to gain a vested position.” *McCarthy v. Calif. Tahoe Regional Planning Agency*, 129  
18      Cal. App. 3d 222, 233 (1982) (holding that the “hasty sequence of events here compels the  
19      conclusion that the work performed and sum expended were guilefully and precipitously done  
20      solely to gain a vested position” to avoid complying with FAA regulations). *See also Aries Dev.*  
21      *Co. v. California Coastal Zone Conservation Comm.*, 48 Cal. App. 3d 354, 549 (1975) (“One  
22      who proceeds with ‘unseemly haste’ bears a risk that his conduct might bear the stigma of bad  
23      faith.”) (quotation and citation omitted).

24      Thus, Sunroad cannot state a claim for equitable estoppel or inverse condemnation  
25      because Sunroad has not alleged facts supporting “vested rights” to a 180-foot structure, or that it  
26      acted good faith in constructing a 180-foot structure. Allowing a claim against the City based on  
27      these allegations would be improper, as it would not serve to avoid a “grave injustice,” and it  
28      would defeat the public’s strong interest in airport safety. *See City of Goleta*, 40 Cal. 4th at 279.

1 VI. SUNROAD'S ALLEGATIONS FAIL TO STATE A CLAIM FOR EQUITABLE  
2 ESTOPPEL AND INVERSE CONDEMNATION BASED ON A PUBLIC  
3 NUISANCE LAWSUIT

4 As a third independent ground for this demurrer, even if the Court concludes that  
5 Sunroad adequately pleaded vested rights to the Sunroad Building framed to the 180-foot height,  
6 any such vested right may be impaired through subsequent police power enactments necessary to  
7 protect public health or safety. As explained in *Davidson v. County of San Diego*: “The vested  
8 rights doctrine in the land use context is subject . . . to the qualification that such a vested right,  
9 while immune from divestment through ordinary policy power regulations, *may be impaired or*  
10 *revoked if the use authorized or conducted thereunder constitutes a menace to the public health*  
11 *and safety or a public nuisance.”* 49 Cal. App. 4th 639, 649 (1996) (emphasis added). Sunroad  
12 admits that the FAA alerted Sunroad that the Building, framed to a height exceeding 160 feet,  
13 encroaches on protected airspace and constitutes a danger to the public health and safety. CC  
14 ¶¶ 7, 10.<sup>6</sup> Given these allegations, it is apparent that Sunroad’s claim “fails to acknowledge . . .  
15 that notwithstanding the rights created by [a City-issued permit], the local agency may apply  
16 subsequent regulations to the project if it determines a failure to do so would create a condition  
17 dangerous to the public health and safety.” *Davidson*, 49 Cal. App. 4th at 649.

18 Moreover, the City has authority under its police power to abate any nuisance without  
19 giving rise to a claim for inverse condemnation. *See Lucas v. S.C. Coastal Council*, 505 U.S.  
20 1003, 1029 (1992) (recognizing the right of states to “abate nuisances that affect the public  
21 generally”); *People ex rel. Dept. of Transportation v. Hadley Fruit Orchards, Inc.*, 59 Cal. App.  
22 3d 49, 53 (1976) (“The abatement of a public nuisance pursuant to a reasonable exercise of the  
23 police power does not require the payment of compensation at all.”). Any claim for damages

24 <sup>6</sup> It is explicitly within the City’s police power to stop potential airport hazards. Under  
25 California Government Code § 50485.1, an “airport hazard” is “any structure or tree or use of  
26 land which obstructs the airspace required for the flight of aircraft in landing or taking off at  
27 an airport or is otherwise hazardous to such landing or taking off of aircraft.” The declared  
28 policy of California is that “the creation or establishment of an airport hazard is a public  
nuisance” and “airport hazards be prevented by appropriate exercise of the police power  
. . . .” Cal. Gov’t Code § 50485.2. Any part of the Sunroad Building in excess of 160 feet  
AGL has been declared by the FAA to be a “Hazard to Air Navigation.” CC ¶ 11. Thus, the  
City’s issuance of the SWO was a legitimate and essential exercise of its police powers.

1 based on the City's actions are therefore untenable.

2 In a case close in point, *Scott v. City of Del Mar*, oceanfront homeowners sued the City of  
3 Del Mar in inverse condemnation after it removed a seawall adjacent to their homes. 58 Cal.  
4 App. 4th 1296 (1997). The homeowners sought compensation for the destruction itself and the  
5 diminution in the value of their homes that resulted. *Scott*, 58 Cal. App. 4th at 1301. Despite the  
6 general rule that compensation is required for "any actual physical injury" to property by the  
7 government, the exception for nuisance abatement applied in this case because the legislature  
8 had determined "that the obstruction of a public-right-of-way" was "an abatable nuisance." *Id.* at  
9 1305. By virtue of that fact alone, tearing down the seawall did "not give rise to an inverse  
10 condemnation action" and the homeowners were not entitled to any compensation. *Id.* at 1307.  
11 In the present action, Sunroad paradoxically alleges that if the City is *successful* in having the  
12 Building declared a nuisance, Sunroad will be entitled to compensation; rather, a nuisance  
13 determination would preclude Sunroad from *any* compensation. Therefore, Sunroad fails to state  
14 a cause of action for inverse condemnation.

15 In addition, any action by the City to file the public nuisance lawsuit in this action,  
16 whatever its merits, is protected by the privileges set forth in Government Code §§ 815.2 and  
17 820.2. *See H&M Associates v. City of El Centro*, 109 Cal. App. 3d 399, 406 (1980) (public  
18 entity and its employees cannot be liable for an injury resulting from discretionary activities "to  
19 assure that courts refuse to pass judgment on policy decisions in the province of coordinate  
20 branches of government"). These acts, in addition to the issuance of the SWO, are also protected  
21 by Government Code § 820.6, which provides: "[i]f a public employee acts in good faith,  
22 without malice, and under the apparent authority of an enactment that is unconstitutional, invalid  
23 or inapplicable, he is not liable for an injury caused thereby except to the extent that he would  
24 have been liable had the enactment been constitutional, valid and applicable."<sup>7</sup> Moreover, any

25 \_\_\_\_\_  
26 <sup>7</sup> To the extent that Sunroad's claims are predicated on damage caused by the City's actions,  
27 including any "stigma" suffered by Sunroad as a result thereof, *see* CC ¶ 18, such claims are  
28 barred by California Civil Code §§ 47(a) and (b), which protect any publication or broadcast  
in the "proper discharge of an official duty" (Cal. Civ. Code § 47(a)) or in any judicial  
proceeding or any other proceeding authorized by law and subject to administrative review  
(Cal. Civ. Code § 47(b)). *See Royer v. Steinberg*, 90 Cal. App. 3d 490, 500 (1979) (Section

1 damage arising from the issuance of the SWO is protected by Government Code § 818.4, which  
2 provides a public agency with immunity for “an injury caused by the issuance, denial,  
3 suspension, or revocation of . . . any permit . . . or similar authorization where the public entity  
4 . . . is authorized to determine whether or not such authorization should be issued, denied,  
5 suspended or revoked.” Because the acts upon which Sunroad’s claims are based are  
6 discretionary in nature and there are no allegations suggesting that the City acted in bad faith,  
7 Sunroad’s tort claims fail as a matter of law due to these statutory immunities.

8 **VII. SUNROAD’S CLAIM FOR INVERSE CONDEMNATION FAILS TO STATE A**  
9 **CAUSE OF ACTION BECAUSE IT IS NOT RIPE FOR REVIEW**

10 As a fourth and independent ground for demurrer, Sunroad’s attempt to use the current  
11 litigation as a basis for inverse condemnation violates the requirement that the matter be ripe for  
12 review. In this case, Sunroad’s claim is not ripe until 1) the nuisance lawsuit has been  
13 adjudicated, as discussed immediately above, and 2) Sunroad has exhausted its available  
14 administrative remedies. The requirement of exhaustion of administrative remedies is a  
15 jurisdictional prerequisite to bring an action that challenges an agency decision. *Albelleira v.*  
16 *District Court of Appeal*, 17 Cal. 2d 280 (1941). As one court wrote:

17 When administrative machinery exists for resolution of  
18 differences, the courts will not act until such administrative  
19 procedures are fully utilized and exhausted. To do so would be in  
20 excess of their jurisdiction. Because the rule is jurisdictional, the  
doctrines is not open for judicial discretion. The rule is applicable  
whether the petitioner is seeking ordinary mandamus or  
administrative mandamus.

21 *Leff v. City of Monterey Park*, 218 Cal. App. 3d 674, 680-81 (1970).

22 Sunroad alleges that “*if successful*, the City’s action will constitute a permanent taking of  
23 Sunroad’s vested property interest.” CC ¶ 30 (emphasis added). The adjudication of this lawsuit  
24 will provide the “final and authoritative determination of the type and intensity of development  
25 legally permitted” on the Building that is necessary before this Court may consider the inverse  
26

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27 47(a) “protects any statement by a public official, so long as it is made (a) while exercising  
28 policy-making functions, and (b) within the scope of his official duties”); *Rubin v. Green*, 4  
Cal. 4th 1187, 1193 (1993) (holding that communications with “some relation” to judicial  
proceedings are “absolutely immune from tort liability” under Section 47(b)).

1 condemnation claim. *Calprop Corp. v. City of San Diego*, 77 Cal. App. 4th 582, 590-591 (2000).  
2 Indeed, addressing an assertion that a takings claim was ripe for review, the Supreme Court of  
3 California, relying on U.S. Supreme Court precedent, found that “until a final administrative  
4 decision has been made, one which affords the administrative agency and any reviewing body  
5 having similar authority the opportunity to amend the agency decision and/or grant a variance,  
6 whether a taking has occurred through application of a land-use regulation to specific property  
7 cannot be determined . . . .” *Hensler v. City of Glendale*, 8 Cal. 4th 1, 10-11 (1994).

8 **VIII. SUNROAD’S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BARS**  
9 **ITS SECOND AND THIRD CAUSES OF ACTION**

10 **A. Sunroad’s Claim for Inverse Condemnation on the Basis of the Stop Work**  
11 **Order Fails Assert Facts Demonstrating An Exhaustion of Remedies**

12 Sunroad’s claim for inverse condemnation legally concludes that the City’s Stop Work  
13 Order “constitutes a temporary taking of Sunroad’s vested property interest” and that “[if]  
14 successful, the City’s action [to prevent further construction] will constitute a permanent taking.”  
15 CC ¶¶ 27, 29. Inverse condemnation claims require that the party bringing the challenge has  
16 previously exhausted all possible administrative remedies. *Hensler v. City of Glendale*, 8 Cal.  
17 4th 1, 13 (1994); *see also Igna v. City of Baldwin Park*, 9 Cal. App. 3d 909, 915 (1970) (prior to  
18 bringing an inverse condemnation claim, the “party aggrieved by the application of a statute or  
19 ordinance must invoke and exhaust the administrative remedies provided thereby”) (citations  
20 omitted). Sunroad alleges no facts in the Cross-Complaint that suggests it has exhausted its  
21 administrative remedies.

22 Sunroad admits that it has invoked the administrative review process, and that it  
23 “appealed the Stop Work Order on November 28, 2006.” CC ¶ 14. Sunroad fails to plead the  
24 existence of any further action following December 21, 2006. *Id.* The Municipal Code provides  
25 for such further process following the issuance of a SWO. *See* Municipal Code § 121.0309(c).  
26 Specifically, when a SWO is issued, the Development Services Director “shall” review the  
27 appeal and “[t]he decision maker will provide informal rapid access for appellants[.]” *Id.* That  
28 appeal process applies here, where the City issued the SWO for abatement of an unsafe condition

1 and public nuisance, not because of any building permit violation, but because of public danger  
2 and violations of state and federal law.

3 According to Sunroad's allegations, the administrative process has been perfected,  
4 despite its pending appeal. CC ¶ 15. Sunroad is required to exhaust its available remedies  
5 before bringing further action. By failing to allege an attempt to pursue available administrative  
6 remedies prior to bringing suit, Sunroad's cause of action for inverse condemnation fails. *See*  
7 *Igna v. City of Baldwin Park*, 9 Cal. App. 3d at 911 (in inverse condemnation claim, holding that  
8 plaintiff's failure to "allege compliance with the applicable . . . statutes" prior to bringing suit  
9 rendered the suit "prematurely instituted"). Sunroad has not alleged compliance with the appeals  
10 process and thus its claims are premature.

11 In seeking to allege around the exhaustion requirement, Sunroad alleges that "it would be  
12 futile for [it] to challenge the City's action in any other forum due to the fact that the City has  
13 sued Sunroad seeking the deconstruction of the Building." CC ¶ 29. Futility offers a very  
14 limited exception to the exhaustion requirement. *See Kaiser Foundation Hospitals v. Superior*  
15 *Court*, 128 Cal. App. 4th 85, 101 (2005); *County of Contra Costa v. State of California*, 177 Cal.  
16 *App. 3d* 62, 77 (1986); *Ogo Associates v. City of Torrance*, 37 Cal. App. 3d 830, 834 (1974)  
17 (describing the futility exception to exist only "when the aggrieved party can positively state  
18 what the administrative agency's decision in his particular case would be"). To support its  
19 futility claim, Sunroad has offered only the existence of the City's protective lawsuit. CC ¶ 29.  
20 That factual allegation is facially inadequate to "positively state" that the review supplied by the  
21 Development Services Director would be futile.

22 **B. Sunroad's Petition for Writ of Mandate Fails to Allege a Proper Basis**

23 In its Third Cause of Action for Writ of Mandate, Sunroad seeks "[a]n alternative writ of  
24 mandate . . . prohibiting the City from taking any action to limit Sunroad from performing work  
25 consistent with or in accordance with the building permit." CC ¶ 40. Sunroad points to the  
26 City's "existing Stop Work Order" and "the City's present litigation" as causing "substantial  
27 damages to Sunroad" warranting the writ. CC ¶ 36. Sunroad's petition seeks to bypass both the  
28 administrative process for appealing a SWO and the underlying litigation. Such a request is an

1 inappropriate basis for issuing a writ of mandate under either Code of Civil Procedure § 1085(a)  
2 or § 1094.5, and Sunroad’s petition is defective on multiple grounds.

3 Under Code of Civil Procedure § 1085(a), a writ of mandate may be issued “to compel  
4 the admission of a party to the use and enjoyment of a right or office to which the party is  
5 entitled, and from which the party is unlawfully precluded[.]” Cal. Civ. Pro. Code § 1085(a).  
6 “[T]wo basic requirements are essential to the issuance of the writ: (1) A clear, present and  
7 usually ministerial duty upon the part of the respondent . . . , and (2) a clear, present and  
8 beneficial right in the petitioner to the performance of that duty.” *Baldwin-Lima-Hamilton Corp.*  
9 *v. Superior Court of San Francisco*, 208 Cal. App. 2d 803, 813-14 (1962) (internal citations  
10 omitted). Sunroad has wholly failed to allege facts establishing either requirement.

11 First , Municipal Code § 121.0308(b) expressly grants the City the discretion to stop  
12 “building operations that are in violation of . . . applicable law.” Sunroad’s allegations amount to  
13 an admission of violation of state and federal law. *See supra* at 6-9. Therefore, Sunroad has  
14 failed to allege any facts supporting a “clear” or “present” duty on the City to allow Sunroad to  
15 operate under the permit. The same violation of law precludes Sunroad from alleging facts  
16 establishing a “present and beneficial right” to performance of that duty. *Id.* Second, mandamus  
17 relief is improper where petitioner has an adequate legal remedy. *Cal. Admin. Mand.* § 7.20 at  
18 340; *Tivens v. Assessment Appeals Bd.*, 31 Cal. App. 3d 945, 947 (1973). A damages action is  
19 usually adequate and thus mandate is unavailable to enforce a contractual obligation against a  
20 public entity. *See, e.g., Shaw v. Regents of the University of California*, 58 Cal. App. 4th 44,  
21 51-52 (1997); *Wenzler v. Municipal Court*, 235 Cal. App. 2d 128, 132 (1965). Here, Sunroad  
22 has an adequate remedy at law; it has sued the City seeking to recover monetary damages in this  
23 very action. Because Sunroad’s own pleading establishes that it has an adequate remedy at law,  
24 extraordinary relief by mandamus will not lie. Cal. Civ. Proc. Code § 1086. *See also ABI, Inc.*  
25 *v. City of Los Angeles*, 153 Cal. App. 3d 669, 687-88 (1984).

26 Finally, administrative writs of mandate also require exhaustion of administrative  
27 remedies as a threshold requirement to bringing a petition. *See* Cal. Civ. Proc. Code § 1094.5(b);  
28 *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 292 (1941) (when seeking an extraordinary

1 writ “the rule is that where an administrative remedy is provided by statute, relief must be sought  
2 from the administrative body and this remedy exhausted before the courts will act”); *Bollengier*  
3 *v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1126 (1990). Without having completed the  
4 administrative process, the court cannot evaluate “whether the respondent has proceeded  
5 without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any  
6 prejudicial abuse of discretion.” Cal. Civ. Proc. Code § 1094.5(b). *See also Rich v. State Board*  
7 *of Optometry*, 235 Cal. App. 2d 591, 601 (1965). Sunroad has a process by which to appeal the  
8 SWO, and has availed itself of that process by filing an appeal, which is pending. *See Godfrey*  
9 *Decl.*, Exh. D. Prior to exhaustion of administrative remedies, this Court has no basis by which  
10 to evaluate the alternative writ of mandate and therefore the cause of action fails on its face.

11 **IX. CONCLUSION**

12 Sunroad has filed a Cross-Complaint that reveals its own defects on its face: Sunroad has  
13 no vested right or good faith reliance on the City’s actions; Sunroad is in violation of federal and  
14 state law; and Sunroad cannot sue the City for legitimate efforts to protect public safety. The  
15 demurrer to the Complaint should therefore be sustained without leave to amend because based  
16 on Sunroad’s allegations, there is no “reasonable possibility that the defect[s] [in the Cross-  
17 Complaint] can be cured by amendment.” *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985).

18 Dated: March 20, 2007

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21 Petitioners, Plaintiffs, and Cross-Defendant  
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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SAN DIEGO  
13 CENTRAL DIVISION  
14

15 THE PEOPLE OF THE STATE OF  
16 CALIFORNIA and THE CITY OF SAN  
DIEGO, a municipal corporation,

17 Plaintiffs,

18 v.

19 SUNROAD CENTRUM, L.P., a California  
20 Limited Partnership, SUNROAD ASSET  
MANAGEMENT, INC., a California  
21 corporation, SUNROAD ENTERPRISES,  
CALIFORNIA DEPARTMENT OF  
22 TRANSPORTATION, AERONAUTICS  
DIVISION, and DOES 1 through 50,  
23 inclusive,

24 Defendants.  
25  
26  
27  
28

CASE NO. GIC 877054

PROOF OF SERVICE

Date: May 11, 2007  
Time: 2:30 p.m.  
Dept.: 64  
Judge: William R. Nevitt, Jr.

Trial Date: Not Yet Set  
Complaint Filed: 12/15/2006

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SUNROAD CENTRUM, L.P., a California  
Limited Partnership, SUNROAD ASSET  
MANAGEMENT, INC., a California  
corporation, SUNROAD ENTERPRISES,

Cross-Complainants  
and Petitioners,

v.

THE CITY OF SAN DIEGO, municipal  
corporation, and DOES 1 through 10,  
inclusive,

Cross-Defendants  
and Respondents.

SD\576100.2

1 I am employed in the County of San Diego, State of California. I am over the age  
2 of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 600  
3 West Broadway, Suite 1800, San Diego, CA 92101.

4 On **March 20, 2007**, I served a true copy of the following document: **CROSS-**  
5 **DEFENDANT AND RESPONDENT CITY OF SAN DIEGO'S AMENDED**  
6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS**  
7 **DEMURRER TO CROSS-COMPLAINT OF SUNROAD CENTRUM, L.P., SUNROAD**  
8 **ASSET MANAGEMENT, INC., AND SUNROAD ENTERPRISES; PROOF OF**  
9 **SERVICE**



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28 *Sunroad Centrum, L.P., Sunroad Asset Management, Inc., and Sunroad*  
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*Sunroad Centrum, L.P., Sunroad Asset Management, Inc., Sunroad Enterprises*



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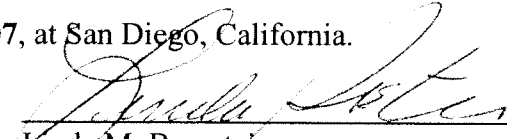


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<p>James F. Pokorny, Esq.  <b>Law Offices of James F. Pokorny</b>          110 West "C" Street, Suite 1504          San Diego, CA 92101          Tel: (619) 239-8142          Email: jpokorny@pacbell.net</p> <p><i>Attorney for Real Party in Interest Aircraft Owners And Pilots Association, Inc.</i></p>	<p>Kathleen A. Yodice, Esq.  <b>Yodice Associates</b>          601 Pennsylvania Ave., N.W.          Suite 875          Washington, DC 20004          Tel: (202) 737-3030          Email: Kathy.Yodice@aopa.org</p> <p><i>Attorney for Real Party in Interest Aircraft Owners And Pilots Association, Inc.</i></p>

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 20, 2007**, at San Diego, California.




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Linda M. Bernstein